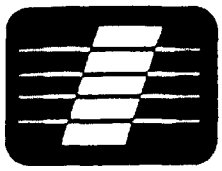

Independent Television

94-123

September 7, 1990

DOCKET FILE COPY ORIGINAL

Donna R. Searcy
Secretary
Federal Communications Commission
Washington, D.C.

Re: Prime Time Access Rule
Petition for Declaratory Ruling
Filed April 18, 1990
By First Media Corporation
EX PARTE COMMUNICATIONS

Dear Ms. Searcy:

This is filed on behalf of the Association of Independent Television Stations, Inc. ("INTV"), to provide two copies of the enclosed letter to the Chairman concerning the above-referenced matter.

We would appreciate your directing any questions concerning this matter to the undersigned.

Very truly yours,

James J. Popham
Vice President, General Counsel

cc: Alfred C. Sikes
Chairman

INTV Association of Independent Television Stations, Inc.
1200 Eighteenth St., N.W., Suite 502, Washington, D.C. 20036 • (202) 887-1970/Fax (202)887-0950

Independent Television

September 7, 1990

The Honorable Alfred C. Sikes
Chairman
Federal Communications Commission
1919 M Street, NW
Washington, DC 20554

Re: PRIME TIME ACCESS RULE
Petition for Declaratory Ruling
Filed April 18, 1990
By First Media Corporation

Dear Mr. Chairman:

On April 18, 1990, First Media Corporation filed the above-referenced Petition for Declaratory Ruling ("Petition"). Therein First Media Corporation urged the Commission to announce via declaratory ruling that the Section 73.658(k) of the Commission's rules (the so-called "prime time access rule") no longer would be enforced because it was constitutionally infirm under the First Amendment. Subsequently, on July 31, 1990, counsel for First Media requested that you "clarify" whether the Commission intended to act on its petition and, if so, when.[1] Although the Commission has established no procedural schedule for comment or consideration regarding First Media's petition, the Association of Independent Television Stations, Inc. ("INTV"), does wish to respond at this time to First Media's Letter.[2]

INTV submits that the Commission should not be rushed to consider First Media's petition or to advise First Media of its

---

[1]Letter from Nathaniel F. Emmons to Chairman Alfred C. Sikes, Federal Communications Commission (July 31, 1990) [hereinafter "Letter"].

[2]INTV reserves the right to address fully the substantive arguments offered by First Media at such time as may be designated by the Commission. Suffice it to say, independent television has developed significantly since the prime time access rule was adopted, and INTV staunchly supports retention of the rule. Indeed, the fundamental issue raised by First Media was resolved in Mt. Mansfield Television, Inc. v. FCC, 442 F.2d 470 (2d Cir. 1971).

INTV Association of Independent Television Stations, Inc.
1200 Eighteenth St., N.W., Suite 502, Washington, D.C. 20036 • (202) 887-1970/Fax (202)887-0950

intentions with respect thereto. First Media's request that it be advised of the Commission's "intentions" for handling its Petition is baseless.[3] Nothing requires the Commission to telegraph its plans for handling any particular issue or pleading before it. Yakima Valley Cablevision, Inc. v. FCC, 794 F.2d 737 (D.C. Cir. 1986), cited by First Media in its letter of July 31, 1990, at 2, at the very most stands for the proposition that an agency must explain whatever action it chooses to take in responding to a request for declaratory ruling. As stated by the court, the issue before it therein was "whether the Commission adequately explained its decision to change its enforcement policy retroactively." Id., 794 F.2d at 745 [emphasis supplied]. The court intimated nothing concerning any obligation on the Commission's part to provide petitioners prior notice of its intentions with respect to procedures for consideration of their petitions.[4] Therefore, the Commission is under no compulsion, legal or otherwise, to advise First Media of its intended procedures.

Similarly, consideration of First Media's petition ought not be hurried. The basic legal premise of First Media's Petition now is subject to considerably more question in light of the decision of the Supreme Court in Metro Broadcasting, Inc. v FCC, 497 US ___, 111 L Ed 2d 445, 110 S Ct ___ (1990). The linchpin of First Media's argument that the prime time access rule violates the First Amendment is the Commission's purported abrogation of the scarcity rationale when it eliminated the fairness doctrine.[5] However, in Metro Broadcasting the Court cited with approval the case which initially enshrined the scarcity rationale:

> We have long recognized that "because scarcity of [electromagnetic] frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium." Red Lion Broadcasting Co. v FCC, 395 U.S. 367, 390, 23 L Ed 2d 371, 89 S Ct 1794 (1969).

---

[3]Letter at 2.

[4]The court was no less mute with respect to the timing or type of procedures which the Commission might choose to employ in considering requests for declaratory rulings. furthermore, the court acknowledged the broad power of the Commission to refuse to grant declaratory relief. 794 F. 2d at 747.

[5]Petition at 7-13.

Furthermore, as the Court also acknowledged, the Commission itself already had distinguished its decision eliminating the fairness doctrine from possible rescission of other of its regulations:

> The Commission has expressly noted that its decision to abrogate the fairness doctrine does not in its view call into question its 'regulations designed to promote diversity.' Syracuse Peace Council (Reconsideration), 3 FCC Rcd 2035, 2041, n 56 (1988).

111 L Ed 2d at 479.[6] The prime time access rule, of course, epitomizes regulation "designed to promote diversity."[7] In view of the Court's pronouncements in Metro Broadcasting, the legal foundation of First Media's Petition has deteriorated markedly. Because First Media has offered no more than this singular basis (i.e., the alleged demise of the scarcity rationale) for the issuance of a declaratory ruling, the Commission cannot precipitously embrace its legal argument and hurry consideration of its Petition.[8]

---

[6]The Commission concluded that growth of broadcasting and the development of competitive video media justified elimination of the fairness doctrine. Report Concerning the General Fairness Doctrine Obligations of Broadcast Licensees, 102 FCC 2d 143, 197 (1985). However, in no way may the Commission determine in summary fashion that the prime time access rule is similarly unnecessary. The implications of such changes in the video marketplace for the prime time access rule arguably are considerably different.

[7]As stated by the court in Mt. Mansfield Television, Inc. v. FCC, supra, 442 F.2d at 477 [emphasis supplied]:

> [T]he prime time access rule, far from violating the First Amendment, appears to be a reasonable step toward fulfillment of its fundamental precepts, for it is the stated purpose of that rule to encourage the "[d]iversity of programs and development of diverse and antagonistic sources of program service" and to correct a situation where "[o]nly three organizations control access to the crucial prime time evening television schedule."

[8]Notably, First Media studiously ignores the purposes and benefits of the prime time access rule in its truncated constitutional analysis. Petition at 13-15. Nowhere does First

The First Media Petition has been pending only since April of this year. The Metro Broadcasting case was decided less than three months ago on June 27, 1990. The focal point of the Petition is, as First Media itself suggests, "a serious constitutional issue of broadcast regulation."[9] The gravity of the issue and the shifting legal landscape mandate thorough and deliberate consideration rather than the proverbial "rush to judgment."

Very truly yours,

James J. Popham
Vice President, General
Counsel

cc: Eugene F. Mullin, Esq.
Nathaniel F. Emmons, Esq.
Counsel for First Media
Robert L. Pettit, Esq.
Roy J. Stewart, Esq.
Henry Geller, Esq.

Media begin to suggest how the changes in the video marketplace alleviate the need for the rule vis-a-vis its intended effects and benefits.

[9]Letter at 2.